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ABSTRACT

The Freedom of Information Act (FOIA) was amended in 1974 in order to restrict government control and to facilitate the public's access to information. However, part of the FOIA bans federal officials from disclosing "trade secrets" and commercial or financial information obtained in confidential circumstances. This exemption has resulted in a great number of requests and lawsuits between the government and business over the disclosure of exempted information. Arguments for the greater release of information to the public state that reverse FOIA suits are illegal and that the released information would not be valuable to competitors. Proponents of withholding information argue that FOIA suits are legal, that the release of information would be harmful in a competitor's hands, that corporations would begin holding back information from the government, and that representatives from foreign countries could obtain nonsecret documents. While seeking a concrete definition of "trade secret" exemption, business can achieve the protection afforded by this exemption through advance agreements on confidentiality, injunctions, civil damage suits, and court orders. At present, the government attitude is that when an agency receives an FOIA request, the information is to be released or an explanation given. (MAI)

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FREEDOM OF INFORMATION CENTER REPORT NO. 393

FOIA: WHAT'S A TRADE SECRET?

This report was written by Curtis Hawker, an M.A. candidate at the University of Missouri School of Journalism.

> No piece of legislation has ever reached the altar with a richer dowry of good-government approbation than the Freedom of Information Act, known in government circles as the FOIA. It was embraced publicly by nearly every politician with a fervor previously reserved (in the days before population explosion) for celebrations of motherhood. The struggle was long, beginning way back in the late 1950s, when the issue was first raised, to 1966, when John Moss of California forced the first information act through Congress, up to 1974, when a fearless legislative branch overrode President Ford's veto to add new teeth to the FOIA; and at every stage the air was thick with praise. A typical example comes from Ralph Nader's Freedom of Information Clearinghouse: "Information is necessary to determine whether the government is protecting the public interest. Access to such information is the lifeblood of a democracy, and if it does not flow to the citizenry, democracy withers."[1]

Introduction

The foremost goal of the FOIA was (New York **Times**, 11-30-75) to open up federal files to the news media and the amendments were enacted to facilitate quicker access to data, according to Julius Duscha, director of the Washington Journalism Center.

As it has turned out, however, the vast majority of requests have come from individuals seeking information concerning themselves at such agencies as the Federal Bureau of Investigation — with lawyers representing business interests a close second.

At the Food and Drug Administration, for example, more than 8,000 requests for information were received (New York **Times**, 11-30-75) in the first 11 months of 1975. Eighty percent of these inquiries were from lawyers representing businessmen; six requests were filed by reporters. In 1976, the number of requests jumped (**Wall Street Journal**, 5-9-77) to 22,000.

The same overwhelming business interest is (New York **Times**, 11-30-75) evident at the Federal Trade Commission, the National Labor Relations Board, the Consumer Product Safety Commission, the Securities and Exchange Commission and the Federal Power Commission.

Supposedly, exemption four of the FOIA bars federal officials from disclosing matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[2] But businessmen grumble (**Wall Street Journal**, 5-9-77) that it happens all too often, because administrative and judicial interpretations of the information act have strayed from the intent of Congress.

This report will examine the ever-increasing conflict between business and government over who will or will not get what information for what reasons.

FOIA Suits

In one of the first lawsuits by the press under the FOIA, Consumers Union sued (**National Observer**, 7-22-68) the Veterans Administration for the complete results of tests made on hearing aids purchased by the VA for distribution to disabled veterans. CU's motives for the suit were mixed.

On the one hand, after having spent $40,000 to analyze only 40 of the 400 models marketed, Consumers Union wanted to cut testing costs for the hearing aids.

On the other hand, there was a larger issue involved, since facts about the hearing aids' performance were important not only to the people wearing the hearing devices, but also to millions with impaired hearing who might consider using the aids if they knew more about them.

Advertising Age seemed to sum up the position of Consumers Union in an editorial that said in part:

> We think it is ironic that the very same federal government which on many fronts is clamoring for more information to be made available by advertisers to consumers is itself sitting on top of

Summary: The Freedom of Information Act was amended in 1974 to facilitate access to information by requesters and to restrict evasion by governmental agencies. But business has found the access so easy that corporations have filed literally thousands of requests and hundreds of lawsuits, presumably to obtain whatever information is available about competitors.

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> literally mountains of test data on thousands of products which, if released, conceivably could be useful to those same consumers.[3]

The VA claimed (New York **Times**, 1-2-69) that the secrets involved in the hearing aids were the properties of the manufacturers. The agency said (**National Observer**, 7-22-68) that it was protecting an agreement it had made with hearing aid manufacturers when it began the testing program in 1956. At that time, the VA had agreed not to release test findings without written consent from the companies.

But CU pointed out that no trade secrets were involved, since the manufacturers provided the VA with only the hearing aids themselves and the instructions on how to use them — the very same materials that any customer purchasing the aids would get. As Colston E. Warne, then Consumers Union president, stated (**National Observer**, 7-22-68):

> The consumer has a right to know. How can Government officials and the Congress repeatedly give assurances to consumers that they will grant freedom of access to information, while the bureaucratic machine grinds out techniques of avoidance of the clear mandate of the Congress?

Others, however, feared that releasing product research that implies that one product is safer than another might make the federal government liable should a citizen injure himself while using the so-called "safe" product. And, as one congressman declared, releasing the consumer information would put the government in the "endorsement business," and that, he thought, could lead to business claims of discrimination and oppression.

CU won (New York **Times**, 10-30-69) a partial victory in early 1969, when a federal judge ruled that the VA must make at least the raw test scores public. Not satisfied and wanting to know how the scores were achieved, CU appealed the decision.

The case was finally settled two and a half years after Consumers Union had filed the original suit. During oral arguments, the VA admitted that the FOIA exemptions did not give it the right to withhold the results of the hearing aid tests. CU won a total victory.[4] Applauding the outcome, **Advertising Age** said:

> There is absolutely no reason why this information should not be made available to anyone and everyone who can make use of it, and we think the various federal agencies that collect such information should make it available as a matter of course.[5]

Another FOIA suit requested what is more commonly desired today — affirmative action plans. These reports, required under Executive Order No. 11246, are designed to show that the federal government's economic power as a consumer is being used affirmatively to prevent racial discrimination in employment.[6]

The Legal Aid Society of Alameda County, Calif., requested the following documents from the Treasury Department: a list of all federal nonconstruction contractors in the county assigned to the department for compliance purposes; all EEO-1 reports detailing the ethnic composition of the listed contractors' work forces; and all of the department's compliance review reports concerning any of the listed contractors.

Citing exemption four of the FOIA as one of its defenses, the Treasury Department argued that disclosure of the compliance review reports was prohibited, since these reviews were conducted with the understanding that the information obtained would be confidential.

But the U.S. District Court for Northern California ordered the department to present the requested documents for in camera inspection, to determine what information should be released and what, if anything, should remain confidential.

The plaintiff in another case sought from the Renegotiation Board of the Department of Labor certain documents that detailed determinations of excessive profits, settlement agreements, contractors' identities and reports, and minutes of settlement negotiations.[7]

The Court of Appeals for the District of Columbia remanded the case for further proceedings, citing the rule laid down in a 1970 case involving Grumman Aircraft Engineering Corporation and the Renegotiation Board:

> After examination of those documents the district court must decide whether they contain commercial or financial information which the contractor would not reveal to the public and therefore are exempt from disclosure or are subject to release only after appropriate deletions have been made.[8]

In a lengthy opinion, the district court decided that most of the information requested was indeed confidential and therefore not to be disclosed:

> The contractor's claim of confidentiality is reasonable because knowledge of production, overhead and operating costs, levels of profit, sales and pricing data, as well as other facts included in the forms would greatly assist those companies in competition with the contractor. . . . Furthermore, public availability of the Standard Forms of Contractor's Report may reduce the number of contractors willing to compete for defense contracts, especially those primarily or even partially in commercial markets; these contractors would have to choose between not competing for a contract covered by the Renegotiation Act and filing forms publicly revealing confidential business information.
>
> Deletion of the names from the forms would not provide adequate protection to the contractors because only eight corporations are involved and an interested party could easily piece together the information to identify the contractor.[9]

Reverse FOIA Suits

Business began to fight back with what have now become known as "reverse" FOIA suits. In one of the more important cases, still in litigation, Chrysler Corporation sought to enjoin the Defense Supply Agency from disclosing the contractor's affirmative action plans and the agency's complaint investigation report and compliance review report.[10] Chrysler said the disclosure of those documents would cause substantial competitive harm in several ways.

First, the manning tables, which detail Chrysler's employee structure according to race, sex and skill level, could aid another corporation in actively identifying people with

the qualities it needs — a practice known as "employee raiding."

Second, the tables would permit a competitor to determine the exact use of the contractor's labor force and, thus, the technology being applied.

And, finally, Chrysler said the documents would allow competitors to reduce risk taking. Waiting to see changes in Chrysler's employee utilization after the purchase of newly designed equipment would enable a competitor to determine whether the machinery decreased or increased costs and, thus, whether or not it was a good investment.

The district court decided partially in Chrysler's favor, citing a Department of Labor statute that forbids the agency to disclose information that would expose the disclosing employee to criminal liability under 18 U.S.C. 1905. The statute makes it illegal for a government employee to disclose confidential statistical data submitted to the government by a corporation.

Public disclosure of certain portions of the contested documents was permanently enjoined, but the district court denied Chrysler's request for a declaratory judgment that any future disclosure of similar documents would violate federal law.[11]

Both sides appealed. The 3rd Circuit Court of Appeals took the case and, in a complex and lengthy opinion given in September 1977, decided against Chrysler for two basic reasons.

First, the court rejected the argument that reverse FOIA suits are an implied cause of action for submitters. The court said:

> Recognizing an implied cause of action to prevent agency disclosure of exempt FOIA information would, we think, be inconsistent with that general philosophy [of full disclosure], since it would place in the hands of interested submitters of information, rather than those of presumedly disinterested governmental officials, the authority to take steps which might impede the dissemination of information of public importance.[12]

And, secondly, the court said that federal agencies are not required to withhold information simply because it falls into one of the FOIA's nine exempt categories. The court took the position that the exemptions are "a discretionary exemption to the mandatory duty of disclosure."[13]

In March 1978, the Supreme Court decided to review these two aspects of the court of appeals' decision.

Arguments for Release

One of the arguments for greater release of information to the public is that the reverse FOIA suit is illegal. The Justice Department has at times in the past considered such actions as "unconsented suits against the sovereign."[14] This means that unless there is a waiver of sovereign immunity, the government cannot be sued. The Justice Department does not regard the FOIA as authorizing injunctions against disclosure.

Other arguments for release were brought out at hearings of the Subcommittee on Government Information and Individual Rights of the House Government Operations Committee.[15] These discussions in early October 1977 centered around exemption four of the FOIA.

Diane B. Cohn, an attorney with the FoI Clearinghouse, said that business compliance with national civil rights policies and laws is public information that was never meant to be considered confidential.

Cohn also argued that submitters of information can initiate a reverse FOIA suit in a district that is inconvenient for, and without any representation by, the requester.

Nancy Duff Campbell, a professor of law at Georgetown University, told the subcommittee that businesses routinely request confidentiality when submitting information to government agencies.[16] She also said requesters were not able to challenge a submitter's assertions of confidentiality.

Giving a requester the right to challenge a submitter's claim of secrecy would require more than the 10 days currently permitted to answer an initial request, Campbell said. Perhaps 30 days would be a more realistic and equitable time requirement.

Another subcommittee witness accused the Environmental Protection Agency of automatically denying all initial requests for information, if the submitter had claimed it was confidential business data. EPA Deputy General Counsel Michael A. James said this was done in order to comply with the 10-day limit agencies have to answer initial requests and to gain time to scrutinize the requested information for confidentiality.

Proponents of greater release say that information requested under the FOIA, even contractors' proposals, would not be valuable to competitors. One Defense Department official said, "It is hard to believe that they get valuable information."[17] He added that most contain "sanitized descriptions that would be of little value to a competitor."[18]

Arguments for Withholding

One of the first arguments of those who desire some withholding of information is that reverse FOIA suits have been declared legal by some courts. In September 1976, the 4th Circuit Court of Appeals affirmed a district court's right to prohibit the disclosure of a government contractor's confidential business information, either as a violation of 18 U.S.C. 1905 or as an implied right of action under FOIA's exemption four.[19] The appeals court decided that when a statute grants a private party protection from disclosure,

> . . . it carries with it an implied right in the private party to invoke the equity powers of a court to assure him that protection. It matters not that the statute does not in expressed terms accord him the right.[20]

Proponents of withholding cite another argument — that the release of corporate information would cause harm in a competitor's hands.[21] Many industry officials believe that any business information, even that which is screened for proprietary and patent rights, can be of value to a competitor. Some knowledge of economic factors and management techniques could be gleaned from reading a government contract, they said.

At the government subcommittee hearings in October 1977, Burt A. Braverman, a Washington attorney who has represented business interests in reverse FOIA suits, said that private and government documents should be treated differently.[22] The intent of Congress in passing the FOIA was not to increase public access to private business documents collected by the government in its regulatory function, he said.

Also, submitters of information were given too little time,

often as little as five days, to challenge the agency's intended release of information requested under the act, Braverman said.

There are those who say that if greater release of business information becomes the rule, corporations will hold back information from proposals for fear that it will be made public. An official of the Aerospace Industries Association said that already many companies are taking proprietary factors into consideration when drawing up proposals for government contracts and, if possible, eliminating those that could become public.[23] Knowledge that a competitor would have access to certain sensitive information could lead to understating aspects and solutions in the final contract, the official said. The holding back of information could have an impact on the final government procurement selection process.

Another argument against increasing the release of business information is that, as the regulations are now written, there is no screening of applicants. Representatives of foreign governments theoretically can apply through second persons and be granted a request for non-secret and non-proprietary documents.

What Business Is Doing

> The successful bidder on a government contract naturally wants to keep confidential any business data contained in his proposal. The loser, on the other hand, wants to know how he happened to be underbid.[24]

This description of the situation involving bid protests from government contractors is the view of Paul Shnitzer, associate general counsel for contracts at the Government Accounting Office, according to **Access Reports.** This and other opinions were offered at a Federal Bar Association-Bureau of National Affairs briefing conference in Coronado, Calif., in early October 1975.

Shnitzer advised contractors seeking disclosure to go to a responsible official at a high level in the agency. The lower echelons, afraid of making a mistake, tend to err on the side of withholding, he said.

The term "trade secret" has never been defined for FOIA purposes, said Neil Hosenball, general counsel of the National Aeronautics and Space Administration. Court cases suggest, however, that company "know-how" — something that is not patented and not divulged outside the company — is involved.

Hosenball also said it has to be something developed at private expense. It is doubtful that something developed under a government contract and paid for by the government is protected as a trade secret, he said.

C. Joseph Stetler, president of the Pharmaceutical Manufacturers Association, said, "We're looking at where to draw the line. The era of calling everything a trade secret is past."[25]

At a conference of the American Bar Association National Institute in December 1977, Herbert M. Wachtell, a New York attorney, explained that other means of protecting information may be available to business than expensive court fights.[26] In general, those methods involve convincing the agencies that release of the information would cause harm. Businesses should rubber-stamp each exempt item, he said, and should ask to be told each time a request is made for access to the material under the FOIA. In addition, businesses should ask the agencies to return all documents when they are finished with them.

William B. Barton Jr., a Washington lawyer specializing in government and private contracting, says:

> The courts have construed exemption 4 narrowly and require specific proof that disclosure will harm legitimate interests. . . . Making the information "proprietary" or so informing the government is not sufficient. Similarly, promises by a government agency not to disclose, or a statement to that effect in their regulations, may not be sufficient to withstand disclosure pursuant to an FOIA request. . . . It is apparent, that a superficial showing to support a claim of business confidentiality is not sufficient. Further, since it is not the government's data, chances are the agency will not object to release, so the burden to fight disclosure then falls completely on the contractor.[27]

Barton says various courts have shown a willingness to be persuaded by the following approaches:

> • that the information being sought is not the kind that would generally be made available for public perusal.
> • the disclosure of the disputed information would cause substantial harm to competitive position.
> • affidavits from experts which address the disputed material in great detail, with specificity, as opposed to broad assertions.
> • where large documents are concerned, the party seeking to withhold must specify in detail which portions of the document are disclosable. This has been successfully accomplished by formulating a system of itemizing and indexing that correlates statements made in the party's refusal justification with the actual portions of the document.
> • identification of those portions of a disputed document, which, if stricken prior to disclosure, would neutralize any competitive advantage allegedly gained by others.[28]

There are basically four ways for business to achieve the protection afforded by exemption four, Barton says.[29]

(1) Advance agreements. The agency agrees to respect the confidentiality of certain data or to give advance notice (10-20 days) of an intended disclosure. A judge, however, can order disclosure despite such agreements, and agencies sometimes breach their own promises to protect confidentiality.

(2) Injunctions. The courts have recognized the right of private parties to enjoin disclosure of information by the government. Such an injunction should be pursued swiftly, however, in order to be successful.

(3) Civil damage suits. It may be possible to show that disclosure was deliberate and without authority, or that disclosure resulted from "gross negligence" on the part of the government and/or its employees. If so, a civil damage suit may be filed, although there is little case law on the subject.

(4) Court orders. Requested information deemed by the company to be confidential would be provided only upon the issuing of a subpoena. This approach, however, would seem to have limited use in a government procurement situation. The government might simply disqualify the bidder as

nonresponsive, rather than go to the trouble of obtaining a subpoena.

What Government Is Doing

When a government agency receives an FOIA request, the agency must release the information or explain why the information is being withheld. In other words, as far as the courts are concerned, the burden of proof in withholding information falls squarely on the shoulders of the government agency.

The Army, for example, accepts FOIA requests at the lowest echelon, and local authorities can grant release. In case of a denial, the request is forwarded to a higher echelon. "We have very few denials," an Army official says.[30]

At the Federal Bar Association briefing conference in October 1975, Irving Jaffe, then assistant attorney general in the Justice Department's Civil Division, said much of the FOIA litigation involving government contractors concerns disclosure of affirmative action plans (AAP) and EEO-1 forms.[31] According to Jaffe, most executive branches have decided they will make available the AAP submitted by the successful bidder. And they will disclose some parts of the EEO-1, although the Equal Employment Opportunity Commission itself is forbidden by law to do so.

If confidential portions of a document indicate that some withholding is desirable, the courts generally have required that the sensitive portions be excised and the rest of the information be released. Neil Hosenball, general counsel for NASA, described the Justice Department's position as: "You can Swiss cheese it but don't turn it into fine lace. If you have to turn it into fine lace, you ought to deny the request."[32]

What does an agency do when it is faced with an FOIA request for a contractor's proposal, which may run 4,000 pages? Finding it almost impossible to go through such a proposal within the FOIA's 10-day time limit, the NASA practice has been to ask the requester for an extension of time and then to do a conscientious job of going through the proposal to identify commercial, financial or trade secrets.

NASA also has gone back to the contractor whose proposal is being sought to get his input on what should and should not be released — a procedure followed by several other agencies. The final decision on disclosure eventually rests with the government, and NASA sometimes has released information over a contractor's objections.

Other government agencies recently have taken increasingly ingenious stands and have shifted some of the burden back to the government contractor. New regulations of the Consumer Product Safety Commission include the following:

> Any manufacturer. . . who provides to the Commission information. . . and who believes that any portion of that information is entitled to exemption from public disclosure. . . must accompany the information with a written request that the information be considered exempt from disclosure or indicate that such a written request will be made within ten (10) working days of the providing of the information. The request shall (a) identify the portions of the information for which exemption is claimed and (b) state the facts and reasons which support the claimed exemption. The failure to make a written request within the prescribed time limit will be considered an acknowledgement that the subject firm does not wish to claim exempt status.[33]

The new Environmental Protection Agency rules are even more stringent:

> (d) To assert a claim of confidentiality for data contained in a health and safety study, the respondent must submit two copies of the study.
>
> (1) One copy of the study must be complete. In that copy the respondent must indicate what data, if any, are claimed as confidential as specifically as possible by marking the information on each page with a label such as "confidential," "proprietary," or "trade secret."
>
> (2) If some data in the health and safety study are claimed as confidential, the respondent must submit a second copy. The second copy must be complete except that all information claimed as confidential in the first copy must be deleted.
>
> (3) The first copy of the health and safety study will be for internal use by EPA. The second copy will be placed in an open file to be available to the public.[34]

Conclusion

Obviously, business feels the effort to get information through FOIA requests is worthwhile. One possible reason is the hope that a secret will slip out by mistake in the rush to answer a complicated information request within the alloted 10-day time period.[35] So corporations have inundated the courts with lawsuits and counter-lawsuits. The **Wall Street Journal** reported (5-9-77) that in 1976 there were 300 FOIA court cases going on at once.

Of course, in the short run, the one certain beneficiary of the system is the legal profession, which has a whole new category of litigation opened up to it.[36]

Thomas Redburn may have given an accurate portrayal of the access situation today when he said:

> Just as freedom of the press is, in Liebling's phrase, guaranteed only to those who own one, freedom of information has been guaranteed mainly to those who can hire high-powered lawyers to Indian-wrestle the government into submission. . . .
>
> So it is with the Freedom of Information Act: anyone who can afford to have his Washington powerhouse law firm breathing down the FTC's neck, or who happens to work for Ralph Nader, will have a wonderful chance of having his "freedom of information" recognized. As for the rest of us. . . well, it often does not seem worth the bother.[37]

FOOTNOTES

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3. "Disclosing Test Data," **Advertising Age**, March 1, 1971, p. 12.
4. **Ibid.**
5. **Ibid.**
6. **Legal Aid Society of Alameda County v. Shultz**, 41 U.S. Law Week 2231 (Dist. Ct. for No. Calif. 1972).

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8. **Ibid.**
9. **Fisher v. Renegotiation Board,** 41 U.S. Law Week 2551-52 (Dist. Ct. for Dist. Col. 1973).
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20. **Ibid.**
21. Kozicharow, p. 19.
22. "Witnesses Clash," p. 4.
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28. **Ibid.**
29. **Ibid.,** pp. 34, 39.
30. Kozicharow, p. 19.
31. "Special Report," p. 8.
32. **Ibid.,** p. 9.
33. **Federal Register** 42, no. 212, 3 November 1977, 57646.
34. **Federal Register** 43, no. 21, 31 January 1978, 4076.
35. Redburn, p. 20.
36. **Ibid.,** p. 21.
37. **Ibid.,** pp. 18, 21.